

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DANNY MAC,

Plaintiff,

v.

HAPO COMMUNITY CREDIT UNION,  
a Washington Corporation,  
RANDY LUCHSINGER, and JANE  
DOE LUCHSINGER, DAVID SCHULTZ  
AND JANE DOE SCHULTZ,

Defendants.

NO. CV-04-5110-EFS

**ORDER HOLDING IN ABEYANCE IN  
PART AND GRANTING IN PART  
DEFENDANTS' MOTION FOR A  
PROTECTIVE ORDER.**

Before the Court is Defendants' Motion for a Protective Order. (Ct. Rec. 24.) Defendants Motion seeks orders: (1) barring any further electronic discovery and (2) requiring Plaintiffs to finance any further electronic discovery, if any. The Court has reviewed the parties' memoranda and supporting attachments and is fully informed. For the reasons stated herein, the Defendants' Motion for a Protective Order is held in abeyance in part and granted in part.

**I. BACKGROUND**

Defendant HAPO Community Credit Union ("HAPO"), Randy Luchsinger and David Schultz filed a Motion for a Protective Order to prohibit Mr. Mac from seeking any future electronic discovery. (In addition, HAPO filed

1 a substantially similar Motion for Protective Order in the cases of Rita  
2 Dowell (CV-04-5098-EFS) and Ray Martin (CV-04-5109-EFS)). Mr. Martin  
3 filed suit on October 4, 2004, against HAPO, Randy Luchsinger, and David  
4 Schultz alleging retaliatory discrimination. (Ct. Rec. 1.) It is the  
5 Court's understanding Plaintiffs in all three cases consolidated their  
6 electronic discovery issues and Plaintiffs paid \$10,000 to preserve a  
7 copy of HAPO's hard drive. (CV-04-5098-EFS Ct. Rec. 46-2 at 35.)

8 Plaintiffs requested discovery of files contained on HAPO hard  
9 drives relating to Ms. Dowell's employment discrimination claim. On April  
10 11, 2005, the Court signed a Stipulated Order Regarding Protocol for  
11 Electronic Discovery. (CV-04-5098-EFS Ct. Rec. 42.) All parties  
12 compromised to establish a workable electronic discovery plan using  
13 "keyword" searches of HAPO's hard drive. The parties trimmed Plaintiffs'  
14 original request from 164 search terms to fifty (50) words. (CV-04-5098-  
15 EFS Ct. Rec. 30)

16 On May 1, 2005 HAPO's computer search expert, Mr. Gordon Mitchell,  
17 conducted a search of HAPO's hard drive. (CV-04-5098-EFS Ct. Rec. 76-2.)  
18 As stated in the Stipulated Electronic Discovery Protocol, the parties  
19 agreed that keywords producing more than 500 hits would not be evaluated.  
20 (CV-04-5098-EFS Ct. Rec. 42.) Of the fifty search terms, thirty-three  
21 had hits, (CV-04-5098-EFS Ct. Rec. 76-2.). However, two words,  
22 "tournament" and "golf," were estimated to produce over 500 hits. Mr.  
23 Mitchell turned over 2300 documents to defense counsel for these thirty-  
24 three search terms. (CV-04-5098-EFS Ct. Rec. 76-2.) On June 10, 2005,  
25 Defense counsel turned over 1100 pages corresponding to thirteen search  
26 terms to Plaintiffs. (CV-04-5098-EFS Ct. Rec. 76-2.) Defendants

1 anticipate Plaintiffs will seek further electronic discovery and are  
2 especially weary of Plaintiffs' continuing suggestions that HAPO turn  
3 over the hard drive to Plaintiffs' expert. Accordingly, Defendants seek  
4 a protective order to prohibit Plaintiffs from seeking further electronic  
5 discovery.

6       **1. Further Electronic Discovery**

7       Under the Federal Rules of Civil Procedure, the Court may issue a  
8 protective order for "good cause shown," to protect a person or party  
9 from "annoyance, embarrassment, oppression, or undue burden or expense,"  
10 when justice so requires. Fed. R. Civ. P. 26(c). The Defendants argue  
11 further electronic discovery will present HAPO with an undue burden. When  
12 determining whether "good cause" exists for a protective order, a court  
13 must balance the need for discovery against the burdens such discovery  
14 places on the parties. See *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir.  
15 1981). The requesting party bears the burden of demonstrating to the  
16 Court the specific harm that will occur if discovery is not limited.  
17 *Phillips v. Gen. Motors*, 307 F.3d 1206, 1210-11 (9th Cir. 2002).

18       Typically, the party seeking discovery is not allowed free access  
19 to the opposing party's hard drive. See *In re Ford Motor Co.*, 345 F.3d  
20 1315, 1317 (11th Cir. 2003). Such a process might allow the opposing  
21 party to have access to trade secrets and privileged attorney client  
22 information. Accordingly, Plaintiffs' expert shall not have access to  
23 Defendants' hard drive absent a showing of evidence necessitating such  
24 access.

25       In the case at hand, Defendants worked with Plaintiffs to  
26 substantially produce the results contemplated by the Stipulated

1 Electronic Discovery Protocol. The parties agreed on a targeted keyword  
2 search to both increase the chance of finding responsive documents and  
3 decrease the Defendants' burden associated with producing such documents.

4 The Defendants have already produced 1100 electronic discovery  
5 documents at a cost of \$23,000. (Ct. Rec. 63 at 12.) Additionally,  
6 counsel for Defendants spent a significant amount of time preparing for  
7 the search and drafting the Stipulated Electronic Discovery Protocol.  
8 (Ct. Rec. 63 at 12.) Consequently, the Court finds Defendants have shown  
9 "good cause" regarding the undue burden associated with further  
10 electronic discovery.

11 However, the Court's Order prohibiting further electronic discovery  
12 is contingent on the conditions described below. First, the Court orders  
13 Defendants to file a declaration explaining why the words "tournament"  
14 and "golf" were stopped before 500 "hits" were reached. Additionally,  
15 Defendants are ordered to explain why they used an "individual hit"  
16 method (as opposed to a "hits within documents" method) in estimating  
17 whether a word received 500 hits. Although the Stipulated Electronic  
18 Discovery Protocol mandates that only words receiving less than 500  
19 "hits" be produced, it appears that there is some confusion over the word  
20 "hits." For example, Mr. Mitchell stated he stopped the search for the  
21 word "tournament" because there were 400 documents averaging two or more  
22 hits each, thus providing an estimate of 800 hits. (CV-04-5098-EFS Ct.  
23 Rec. 67-2.) Such a procedure for examining hits would allow one document  
24 with the word tournament repeated several times over to influence the  
25 total hit count, even though only one document need be examined. Mr.  
26 Richard Haugen, Plaintiffs' expert, describes this discrepancy between

1 "individual hits" and "hits within a document" in his declaration. (CV-  
2 04-5098-EFS Ct. Rec. 75 at 2).

3       The Court also orders Defendants to produce a list of documents  
4 turned over by Mr. Mitchell to Defense Counsel by file-name only. Any  
5 documents where the file-name itself is subject to some privilege (work-  
6 product, attorney client, etc.) are exempt from this requirement.  
7 Assuming Defendants meet both requirements, the Court will grant the  
8 Defendants' Motion for a Protective Order Prohibiting Further Electronic  
9 Discovery. However, Plaintiffs may renew the request for electronic  
10 discovery upon a showing of new evidence that additional electronic  
11 discovery is likely to produce discoverable information. Such a request  
12 will be subject to the order on cost-sharing described below.

13       **2. Cost-Sharing**

14       Because of the difficulty in extracting and searching for electronic  
15 discovery, courts have developed a framework to evaluate which party must  
16 bear the financial burden of electronic discovery. See e.g. *Zubalake v.*  
17 *UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Rowe Entertainment Inc.*  
18 *v. the William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002).  
19 *Zubalake* modified the framework set forth in *William Morris*, resulting  
20 in the following eight-factor test:

- 21       1. The extent to which the request is specifically tailored  
22           to discover relevant information;  
23       2. The availability of such information from other sources;  
24       3. The total cost of production, compared to the amount in  
25           controversy;  
26       4. The total cost of production, compared to the resources  
         available to each party;

- 1       5. The relative ability of each party to control costs and
- 2       its incentive to do so;
- 3       6. The importance of the issues at stake in the litigation;
- 4       and
- 5       7. The relative benefits to the parties of obtaining the
- 6       information.

7       *Zubalake*, 217 F.R.D. at 322.

8       According to the court in *Zubalake*, the first two factors are the  
9       most important. *Id.* at 323. In addition, the court held that cost  
10      shifting should occur in cases where the information is on a difficult  
11      to retrieve medium, such as back-up tapes, or where fragmented files must  
12      be searched. *Id.* at 324.

13      In the instant case, the first factor weighs in Defendants' favor.  
14      The parties have already formed an agreement specifically tailored to  
15      discover relevant information and limited so as to not be unduly  
16      burdensome. The information resulting from this search has been produced  
17      to Plaintiffs. The second factor is a toss up because Plaintiffs can  
18      depose employees to ask if certain files are on their hard drive or  
19      inbox, but such requests might not be effective for documents produced  
20      years ago. So far, total discovery costs are \$33,000; Defendants have  
21      spent \$23,000 on an expert to conduct discovery, and Plaintiffs have  
22      spent \$10,000 to preserve the contents of HAPO's hard drive. It follows  
23      that a significant amount of money has been spent on discovery by  
24      Defendants to date, and the third and fourth factors weigh in the  
25      Defendants favor. Finally, Plaintiffs are likely the only party to  
26      benefit from conducting a further search. The Court finds that the  
   majority of the factors weigh towards requiring Plaintiffs to pay for

1 electronic discovery requests.

2       A multi-factor analysis indicates that Plaintiffs should finance an  
3 future discovery. This is especially true given that Plaintiffs wish to  
4 search back-up tapes and for fragmented documents, two of the key  
5 instances in which Zubalake felt cost-shifting to be necessary.  
6 Accordingly, the Court grants Defendants' Motion for a Protective Order  
7 requiring Plaintiff to bear the cost of future electronic discovery, thus  
8 if Plaintiffs meet the standard prescribed above for future electronic  
9 discovery, the Court orders Plaintiffs to finance such discovery.

10       Accordingly, **IT IS HEREBY ORDERED:** Defendants' Motion for a  
11 Protective Order, (**Ct. Rec. 24**), is **HELD IN ABEYANCE IN PART AND GRANTED**  
12 **IN PART.** Specifically,

13       1. Defendants' Motion for a Protective Order Barring any Future  
14 Electronic Discovery is **HELD IN ABEYANCE** until Defendants:

15           a. File a Declaration with the Court explaining why searches  
16 for the words "golf" and "tournament" were stopped prior to reaching 6  
17 hits, and explaining why the "individual hits" instead of the "hits  
18 within a document" definition of hits was used to exclude these  
19 search terms; and

20           b. Produce to Plaintiffs a list of all documents receiving hits  
21 in Mr. Mitchell's May 1, 2005, search. After such production, the Court  
22 will **GRANT** the Defendants' Motion for a Protective Order Barring any  
23 Future Electronic Discovery. However, Plaintiffs may seek future  
24 discovery upon a showing that new evidence indicates future discover is  
25 likely to lead to discoverable information.

26       2. Defendants' Motion for a Protective Order Requiring Plaintiffs

1 to Bear the Entire Cost of Further Electronic Discovery, if any, is  
2 **GRANTED**. Therefore, Plaintiffs may seek further electronic discovery if  
3 (1) Plaintiffs make a showing that new evidence indicates future  
4 discovery is likely to lead to discoverable information, and (2)  
5 Plaintiffs finance such discovery.

6       **IT IS SO ORDERED.** The District Court Executive is directed to  
7 enter this Order; and provide copies to all counsel.

8                   **DATED** this 6th day of September 2005.

9  
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11                   S/ Edward F. Shea  
12                   EDWARD F. SHEA  
13                   United States District Judge

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